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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.C., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

S.C.,

Defendant and Appellant.

E064455

(Super.Ct.No. SWJ001913)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge.
Affirmed.

Megan Turkat-Schirn, under appointment by the Court of Appeal, for Defendant
and Appellant.

Gregory P. Priamos, County Counsel, James E. Brown, Guy B. Pittman and
Carole Nunes Fong, Deputy County Counsel for Plaintiff and Respondent.

St.C. (Father) appeals after termination of his parental rights to S.C. (Minor; a girl born Nov. 2013) at a Welfare and Institutions Code section 366.26¹ hearing. Father's sole contention on appeal is that the juvenile court erred when it found the Indian Child Welfare Act (ICWA) did not apply because he was never asked about having Indian ancestry. The termination of his parental rights should be reversed and the matter remanded for further proceedings in compliance with the ICWA.

Although we agree that the Riverside County Department of Public Social Services (the Department) failed to perform its duty to inquire about Father's Indian ancestry, Father has failed to show such failure to inquire was a miscarriage of justice, or prejudicial. We affirm the juvenile court's orders.

FACTUAL AND PROCEDURAL HISTORY

A. DETENTION

M.Y. (Mother)² gave birth to Minor in November 2013. Mother had been involved with the Department since 2003 with four of Minor's half-siblings. Two of the half-siblings had been removed from Mother's care and placed with their father. At the time Minor was detained, a section 366.26 hearing had been scheduled for the other two half-siblings. Mother had no contact with the Department for one year even though Minor's half-siblings had been detained. Mother never advised the Department she was

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Mother has not filed an appeal. As such, we only mention the proceedings involving her as they are necessary to show the eventual termination of parental rights, and in regards to the ICWA notice.

pregnant with Minor because she was afraid Minor would be removed from her care. Mother had a history of alcohol abuse and domestic violence.

Mother was contacted at a home in San Jacinto. Mother lived with four other adults. Mother was on probation for child abuse/endangerment. Mother claimed she had been clean and sober for two months. She did not understand the court process and why her other children had been removed from her.

Mother advised the social worker that her relationship with Father had been unhealthy and violent. Father injured her while she was pregnant with Minor. She called the police and he was arrested. Mother indicated that Father was serving an eight-year sentence for domestic violence. Mother did not know if Father knew that she had Minor. Father was not present to sign the birth certificate.

Minor appeared to be in good health and Mother had adequate provisions for her care. Minor had received regular medical care. Minor was left in the care of Mother. Minor was detained from Father due to his incarceration. Father had not met Minor and had provided no care to Minor.

On April 22, 2014, the Department filed a section 300 petition against Mother and Father (Parents) for Minor. It was alleged under section 300, subdivision (b), that Mother had an open dependency case for Minor's half-siblings, abused alcohol and marijuana, had an extensive history with child protective services, struggled to maintain stable housing, and had a criminal history. As for Father, he was not part of the household and failed to provide adequate care, support and protection for Minor. It was also alleged

under section 300, subdivision (g), that Father was currently incarcerated with an unknown release date, which made him unable to provide care and support for Minor.

In the petition, the Department noted that Mother had been asked about her Indian ancestry and she denied any ancestry in her family. There was no information listed for Father. Mother reported that she did not know if Father had any Indian ancestry and the Department noted Father “is not available for an inquiry as to his heritage.” On April 22, 2014, the Department faxed a written notice to Wasco State Prison regarding the detention hearing scheduled for April 23, 2014.

The detention hearing was held on April 23, 2014. Father was not present in court. Father was declared the alleged father. Paternity testing was ordered for Father. Parents were ordered to submit ICWA-20 form regarding Indian status and to notify the Department of any relatives who may be available to take custody of Minor. The juvenile court found a prima facie case and ordered that Minor be detained from Father and remain in the custody of Mother.

B. JURISDICTIONAL/DISPOSITIONAL REPORT AND HEARING

A jurisdiction/disposition report was filed on May 21, 2014. The Department recommended that Minor be placed with Mother and that family maintenance services be offered to her.

The Department recommended the juvenile court find the ICWA did not apply based on Mother’s representation that there was no Indian ancestry. Father was unavailable to contact regarding his ancestry. It was reported that Father had an extensive criminal history. Mother advised the Department that she would not want

Father to have custody of Minor. Mother believed it was in Minor's best interest not to be with Father because Father suffered from mental health issues, including Schizophrenia. He also used drugs while they were together.

The Department sent a letter to Father in Wasco State Prison on May 2, 2014, but had received no response. Mother had been participating in all of her services. Mother further detailed the domestic violence committed by Father against her. He was upset because someone stole his gun and he blamed Mother for letting the person in their house. She was eight months pregnant. He cut her left temple with a pocket knife. She called the police.

Father had no contact with the Department. Father was expected to be incarcerated until October 20, 2017. It was recommended that services be terminated as to Father pursuant to section 361.5, subdivisions (a) and (e)(1). The Department recommended the juvenile court find the ICWA did not apply.

The hearing was held on May 27, 2014. Mother was present at the hearing. Counsel for Father was present. Father wanted to appear by telephone but it could not be arranged with the prison. Mother waived her rights but the matter was set contested as to Father. Father was served with notice of the hearing.

An addendum report was filed on June 26, 2014. Minor was to remain with Mother on family maintenance. Father was scheduled to submit to paternity testing on June 26, 2014. Mother was making significant progress.

The contested jurisdiction/dispositional hearing was held on July 1, 2014. Father was represented by counsel but not present. Paternity testing had not been completed

because Father had been moved. Further, the Department contended that Father could not achieve presumed status because he was incarcerated when Minor was born and will be in custody until 2017.

Father's counsel advised the juvenile court that Father wanted to appear by telephone. Counsel had contacted the prison and was advised a telephonic appearance could be arranged. However, prior to the hearing, counsel received a message from the prison that the request for a telephone appearance was denied. Father was concerned with Minor being with Mother due to her history and wanted Minor placed with one of his relatives once he established paternity. Father's counsel requested a continuance. Father's counsel agreed that even if the matter was continued, Father most likely could not be present and that his request for a telephonic appearance would most likely be denied. A continuance was denied.

The juvenile court ordered that no reunification services would be granted to Father. The juvenile court found the section 300 subdivision (b), (g) and (j) allegations in the amended section 300 petition true against Parents.³ Paternity testing was again ordered for Father. The matter was set for a Family Maintenance Review hearing. Although not discussed at the hearing, according to the minute order from that day, the juvenile court found the ICWA did not apply.

³ The original petition was amended to change the allegations against Mother; the changes are not relevant here.

C. STATUS REVIEW REPORT

The Department filed a Family Maintenance Review Report on December 16, 2014. Paternity testing revealed Father was Minor's biological father. Mother had relapsed in November 2014 by taking methamphetamine. She claimed she was under a lot of stress to complete her probation and her case plan. Minor was developing normally. The matter was continued.

A review hearing was held on February 4, 2015. Father was not present and was represented by counsel. Family maintenance services were continued. Father's counsel stated Father wanted to be contacted by the social worker, and that if Minor was removed from Mother's care, he had relatives he wished to be assessed for placement.

D. SECTION 387 SUPPLEMENTAL PETITION

On February 24, 2015, a supplemental petition was filed pursuant to section 387. Minor had been detained and placed in a foster home. On February 22, 2015, Mother was discovered passed out on a public sidewalk; Minor was in her stroller nearby. Mother was extremely intoxicated. Mother's blood alcohol level was .317. The social worker reported no contact with Father.

As for the ICWA, the Department declared it did not apply as Mother had denied any Indian ancestry on behalf of her family and Father's family. Further, on July 1, 2014, the juvenile court found the ICWA did not apply.

At the hearing on February 25, 2015, Father's counsel was present. Parents were to disclose all relatives who could be considered for custody. According to the minute

order, Parents were ordered to submit an “ICWA-020” form. The juvenile court found a prima facie case and ordered Minor detained from Parents.

A jurisdiction/disposition report was filed for the section 387 petition. Minor had been placed in a preapproved adoptive home; there were no concerns about Minor’s development. The Department noted that on July 1, 2014, the juvenile court found the ICWA did not apply. The Department again stated that Father was incarcerated and the social worker was unable to contact him. The prison had been contacted and the social worker was informed she could visit the prison to interview Father.

The Department had contacted Father’s counsel to determine if there were any relatives who Father wanted considered for placement. A cousin was suggested. The Department tried several times to contact the cousin by telephone, and had sent her a letter. No response had been received. Mother expressed concern about the cousin. Mother liked Father’s grandparents but had no contact information. The Department recommended denying reunification services to Parents.

A hearing was held on May 7, 2015. Father was not present and waived his appearance. According to Father’s counsel, he understood he would not receive services. He did not want Minor placed with Mother. He wanted Minor placed with a relative but did not have any information regarding a relative who would be available for placement. Father’s counsel asked that the Department contact Father directly about possible relatives for placement. The juvenile court found the ICWA did not apply. Reunification services were denied to Parents. A section 366.26 hearing was set. The juvenile court

ordered that Father's relatives be assessed, including a paternal grandmother in Arizona. Father was again deemed the biological father.

An order for appearance of prisoner was filed on May 14, 2015, for the section 366.26 hearing.

E. SECTION 366.26 REPORT

The Department filed its section 366.26 report on August 19, 2015. The Department recommended terminating the parental rights of Parents. The permanent plan was adoption. Minor was adjusting well to her prospective adoptive home. She was already bonded to the adoptive family. The prospective adoptive family would not have any further contact with Minor's birth parents or other family members after adoption.

F. SECTION 366.26 HEARING

The section 366.26 hearing was conducted on September 1, 2015. Father appeared telephonically. Father requested that either foster care or legal guardianship be considered in place of adoption. Parents' parental rights were terminated and Minor was freed for adoption. No inquiry as to Father's Indian ancestry was made at the hearing.

DISCUSSION

Father's sole contention on appeal is that the juvenile court erred by concluding the ICWA did not apply, as absolutely no inquiry into his Indian ancestry was made by the Department.

The ICWA was enacted in 1978 "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." (25 U.S.C.A. § 1902.) "The ICWA presumes it is in the best interests of the child to retain tribal ties

and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource.” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) “The ICWA defines an an Indian child as “an unmarried person under the age of 18 who is 1) a member of an Indian tribe; or 2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.”” (*In re A.B.* (2008) 164 Cal.App.4th 832, 838.)

California law under section 224.3, subdivision (a) imposes “an affirmative and continuing duty to inquire” whether a child involved in a dependency proceeding “may be an Indian child.” A “social worker has ‘a duty to inquire about and obtain, if possible, all of the information about a child’s family history’” required under regulations promulgated to enforce the ICWA. (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1116.) The ICWA provides that if, ““the court knows or has reason to know that an Indian child is involved,’ the social services agency must ‘notify . . . the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.’” (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1157.)

California Rules of Court, rule 5.481(a) also imposes “an affirmative and continuing duty [on the court and other officials] to inquire whether a child is or may be an Indian child.” In addition, rule 5.481(a)(2) requires the court “[a]t the first appearance by a parent” to order the parent to complete Form ICWA–020, Parental Notification of Indian Status. On this form, the parent must declare under penalty of perjury whether the child or the parent has Indian ancestry and whether the child or the parent is a member of an Indian tribe or could be eligible for membership in an Indian tribe.

In the detention report, the Department noted that Mother denied any Indian ancestry. Further, she did not know if Father had any Indian ancestry. The Department also stated that Father was not available to inquire about his heritage. According to the minute order from the April 23, 2015, detention hearing, Parents were ordered to submit an ICWA-20 form regarding their Indian status. Father's ICWA-20 form is not in the record despite the juvenile court ordering Parents to complete the form. In the jurisdiction/disposition report, the Department recommended that the trial court find the ICWA did not apply because Mother denied Indian ancestry and Father was unavailable to contact regarding his ancestry. According to the minute order from the hearing on July 1, 2014, the ICWA was found not to apply.

After Father was determined to be the biological father, the Department continued to report there was no Indian ancestry based on Mother's representations and the fact the juvenile court made that finding at the July 1, 2014, hearing. When Father appeared telephonically at the section 366.26 hearing, the Department and the juvenile court did not inquire regarding Father's ancestry. Based on the facts of this case, although Father was not initially available, he was available at the section 366.26 hearing. At that time, an inquiry could have been made as to Father's Indian ancestry.

However, we conclude any failure to inquire of Father of his Indian ancestry was harmless under the reasoning of *In re Rebecca R.* (2006) 143 Cal.App.4th 1426 (*Rebecca R.*) and *In re N.E.* (2008) 160 Cal.App.4th 766 (*N.E.*). Father must show "a miscarriage of justice" or prejudice. (*Rebecca R.*, at pp. 1430-1431.) There could be no "miscarriage

of justice” or prejudice unless a parent, if asked, would have stated the child has Indian ancestry. (*Ibid.*)

In *Rebecca R.*, the father claimed on appeal that the order terminating his parental rights should be reversed because there was no evidence to show that the social services agency had inquired about his Indian ancestry. (*Rebecca R.*, *supra*, 143 Cal.App.4th at p. 1428.) The *Rebecca R.* court rejected the father’s claim on the ground there was evidence to support some inquiry was made, and regardless, he had failed to show prejudice. (*Id.* at pp. 1429-1430.) The court stated: “Father complains that he was not asked below whether the child had any Indian heritage. Fair enough. But, there can be no prejudice unless, *if* he had been asked, father *would have* indicated that the child did (or may) have such ancestry. [¶] Father is here, now, before this court. There is nothing whatever which prevented him, in his briefing or otherwise, from removing any doubt or speculation. He should have made an offer of proof or other affirmative representation that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA. He did not. [¶] In the absence of such a representation, the matter amounts to nothing more than trifling with the courts. [Citation.] The knowledge of any Indian connection is a matter wholly within the appealing parent’s knowledge and disclosure is a matter entirely within the parent’s present control. The ICWA is not a ‘get out of jail free’ card dealt to parents of non-Indian children, allowing them to avoid a termination order by withholding secret knowledge, keeping an extra ace up their sleeves. . . . [¶] The burden on an appealing parent to make an affirmative representation of Indian heritage is de minimis. In the absence of such a representation,

there can be no prejudice and no miscarriage of justice requiring reversal.” (*Id.* at p. 1431.)

Here, Father discussed *Rebecca R.* in his opening brief. However, despite recognizing the above-mentioned finding in *Rebecca R.*, he fails to provide any offer of proof that he has any Indian ancestry. Father attempts to distinguish *Rebecca R.* by claiming that, in that case, the father had been granted over one year of reunification services. Father also relies on the fact that in *Rebecca R.*, the reviewing court found that some inquiry had been made.

However, the harmless analysis in *Rebecca R.* did not rely upon the fact that it presumed an adequate inquiry was conducted, but rather found that even if there was no inquiry, it would be harmless. (See *Rebecca R.*, *supra*, 143 Cal.App.4th at p. 1430 [“Third, and finally, we reject father’s claim because father has failed to show a miscarriage of justice, which is the fundamental requisite before an appellate court will reverse a trial court’s judgment (Cal. Const., art. VI, § 13)]”)

Further, in *N.E.*, the father appealed an order terminating his parental rights and claimed that the order must be reversed because the social services agency failed to inquire whether his daughter may have Indian heritage. The mother told the social services agency that the father did not have any Indian ancestry and the father’s counsel stipulated that the ICWA did not apply. (*N.E.*, *supra*, 160 Cal.App.4th at p. 768.) On appeal, the father did not make an offer of proof that he had Indian ancestry. (*Id.* at p. 769.) The *N.E.* court found: “Here, as in *Rebecca R.*, [the father] has not suggested he in fact has any Indian heritage. [The] respondent’s brief discusses *Rebecca R.*, at length, but

even in his reply brief, [the father] still declines to assert he in fact has Indian ancestry. Under the circumstances, he has failed in his burden to demonstrate prejudice and we must affirm.” (*N.E.* at p. 771.)

Like the fathers in *Rebecca R.* and *N.E.*, Father has failed to show any prejudice resulting from the claimed inadequacy of the ICWA inquiry in this case.

DISPOSITION

The juvenile court’s orders are affirmed.

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MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.